

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 05-91543

Roy Lee Patterson,

CHAPTER 7

Debtor.

JUDGE MASSEY

Roy Lee Patterson,

Plaintiff,

v.

ADVERSARY NO. 06-9058

Georgia Department of Revenue,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this adversary proceeding, Plaintiff Roy Patterson seeks a determination that a debt in the amount of \$52,321.47 owed to Defendant Georgia Department of Revenue is dischargeable pursuant to section 523 of the Bankruptcy Code. In the complaint, Plaintiff failed to elaborate on the precise factual basis for the relief sought. Defendant answered the complaint but did not file a counterclaim seeking a determination that the debt is not dischargeable. Defendant then moved to dismiss the complaint, but the Court denied that motion in an order entered on October 20, 2006. On November 3, 2006, Defendant moved for summary judgment, asserting that the tax debt owed to it by Mr. Patterson with respect to the tax years in question is nondischargeable

pursuant to section 523(a)(1)(B)(i) of the Bankruptcy Code. Mr. Patterson did not respond to Defendant's motion, which is deemed unopposed. BLR 7007-1(c).

Under Fed. R. Civ. P. 56(c), made applicable in adversary proceedings by Fed. R. Bankr. P. 7056, summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The non-moving party's failure to respond merely establishes the well-pleaded facts; it does not automatically entitle the moving party to judgment based solely on the failure to respond to the motion. The First Circuit applied this principal in *Cordi-Allen v. Halloran*, 2006 WL 3375100, *2 (1st Cir. 2006), stating:

Because the motion for summary judgment went unopposed, we review the case on the facts as set forth in the defendant's motion for summary judgment. D. Mass. Loc. R. 56.1; see *Stonkus*, 322 F.3d at 102. Summary judgment is only appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Similarly, in *Stough v. Mayville Cmty Sch.*, 138 F.3d 612, 616 (6th Cir. 1998), the Sixth Circuit reversed a grant of an unopposed motion for summary judgment pursuant to a local court rule, holding that, by merely failing to respond, the nonmoving party's "behavior did not rise to the level of a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure."

In support of its motion, Defendant filed a statement of material facts in accordance with BLR 7056-1(a)(1). Because Mr. Patterson has not filed a response, the facts set out in Defendant's statement of material facts are deemed admitted. BLR 7056-1(a)(2). The undisputed facts, set out in the affidavit of Phylis Pearson submitted in support of the motion, are as follows:

Plaintiff filed original Georgia income tax returns for 1985, 1986, and 1987. After the filing of Plaintiff's original 1985 through 1987 Georgia income tax returns, the Internal Revenue Service revised Plaintiff's federal income tax liabilities upwards. After the revision to Plaintiff's 1985 through 1987 federal income tax liabilities, the Plaintiff did not file the amended Georgia income tax returns for these years

required by O.C.G.A. § 48-7-82(e)(1). The Georgia income taxes due from Plaintiff for 1985 through 1987 result solely from the Internal Revenue Service's revision to Plaintiff's federal income tax liabilities.

Defendant is entitled to summary judgment if these undisputed facts, viewed in the light most favorable to Mr. Patterson, show that this debt is nondischargeable pursuant to section 523(a)(1)(B)(i). Section 523(a)(1)(B)(i) exempts from discharge any debt

(1) for a tax or a customs duty—

...

(B) with respect to which a return, if required—

(i) was not filed.

11 U.S.C. § 523(a)(1)(B)(i). The creditor bears the burden of proving that the debt is nondischargeable. *In re Wilbert*, 262 B.R. 571, 576 (Bankr. N.D. Ga 2001).

Defendant cites two cases from this district to support its assertion that the underlying debt is nondischargeable. *See In re Jones*, 158 B.R. 535 (Bankr. N.D. Ga 1993) (Bihary, J.); *In the Matter of Pham*, 2005 Bankr. LEXIS 758 (Bankr. N.D. Ga March 1, 2005) (Diehl, J.). In both of these cases, the failure to file an amended state tax return was the basis for determining tax debt to be nondischargeable. In *In re Dyer*, 158 B.R. 904 (W.D.N.Y. 1993), the court construed section 523(a)(1)(B)(i) to exclude the same type of amended return required by the Georgia Department of Revenue at issue in this case. That court reasoned that “dischargeable taxes are not converted into nondischargeable taxes by a State’s ‘requiring’ successive returns (‘amended returns’) addressing the same [sic] basic information, or by a State’s labeling all ‘amendments’ or ‘notifications’ as ‘returns.’” *Id.* at 906. This Court disagrees. If a taxpayer understates tax

liability by understating taxable income and omits to file a required amendment, the word “return” in section 523(a)(1)(B)(i) includes such an amended return.

In order for the failure to file a return to lead to a nondischargeable tax debt, the taxpayer must be required to file the return. *See* 11 U.S.C. § 523(a)(1)(B). Ga. Code Ann. § 48-7-82(e)(1) provides in pertinent part that:

When a taxpayer's amount of *net income* for any year under this chapter as returned to the United States Department of the Treasury is changed or corrected by the commissioner of internal revenue or other officer of the United States of competent authority, the taxpayer, within 180 days after final determination of the changed or corrected net income, shall make a return to the commissioner of the changed or corrected income . . .

Ga. Code Ann. § 48-7-82(e)(1) (emphasis added). Under this provision, Georgia taxpayers are required to make a return with the Georgia Department of Revenue when the IRS adjusts the taxpayer's *net income*. Nothing in this provision triggers a filing requirement when the IRS adjusts the taxpayer's federal *tax liability*, which is the fact on which Defendant relies.

Patterson's tax liability for the years 1985, 1986, and 1987 could have been adjusted by the IRS without an adjustment to his net income; for example, Mr. Patterson could have made a mistake in computing the tax based on net income that did not change. Thus, under the facts established in the record, it is possible that the filing requirement of Ga. Code Ann. § 48-7-82(e)(1) was not triggered. Hence, Defendant has failed to show that Plaintiff was required to file an amended return.

The uncontroverted facts are also insufficient to enable the Court to determine the amount of nondischargeable debt, if any. The failure to file a required amended return renders nondischargeable only the additional tax that the debtor owes over the tax debt reflected in the original return. *In re Haywood*, 62 B.R. 482, 486 (Bankr. N.D. Ill. 1986) (debtor's tax liability for

years in which he failed to file amended returns held nondischargeable only to the extent of the difference between his actual tax liability and that which he reported in the returns he did file). Plaintiff admits he owes over \$52,000 in tax debt to Defendant, but Defendant failed to show the amount of taxable income set forth in the returns initially filed. Hence, the Court cannot determine the amount of nondischargeable debt, even if the amended returns were required due to additional taxable income not reflected in the original returns.

Accordingly, Defendant has not met its burden for summary judgment.

When the *moving party* has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it “must support its motion with credible evidence ... that would entitle it to a directed verdict if not controverted at trial.” *Id.* at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting); *see also Chanel, Inc.*, 931 F.2d at 1477. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party. *See id.* at 1477.

United States v. Four Parcels of Real Prop. in Greene and Tuscaloosa Counties in State of Ala., 941 F.2d 1428, 1438 (11th Cir. 1991). As discussed above, Defendant failed to demonstrate the absence of genuine issues of material fact essential to the determination of dischargeability.

Accordingly, it is

ORDERED that Defendant’s motion for summary judgment is DENIED.

Dated: December 12, 2006.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE